Brief of Def't in Error for U. S.

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SUPREME COURT OF THE UNITED STATES.

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JAMES H. McKENNEY,
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BY FRANK L. FISH AND CHARLES A. PROUTY.

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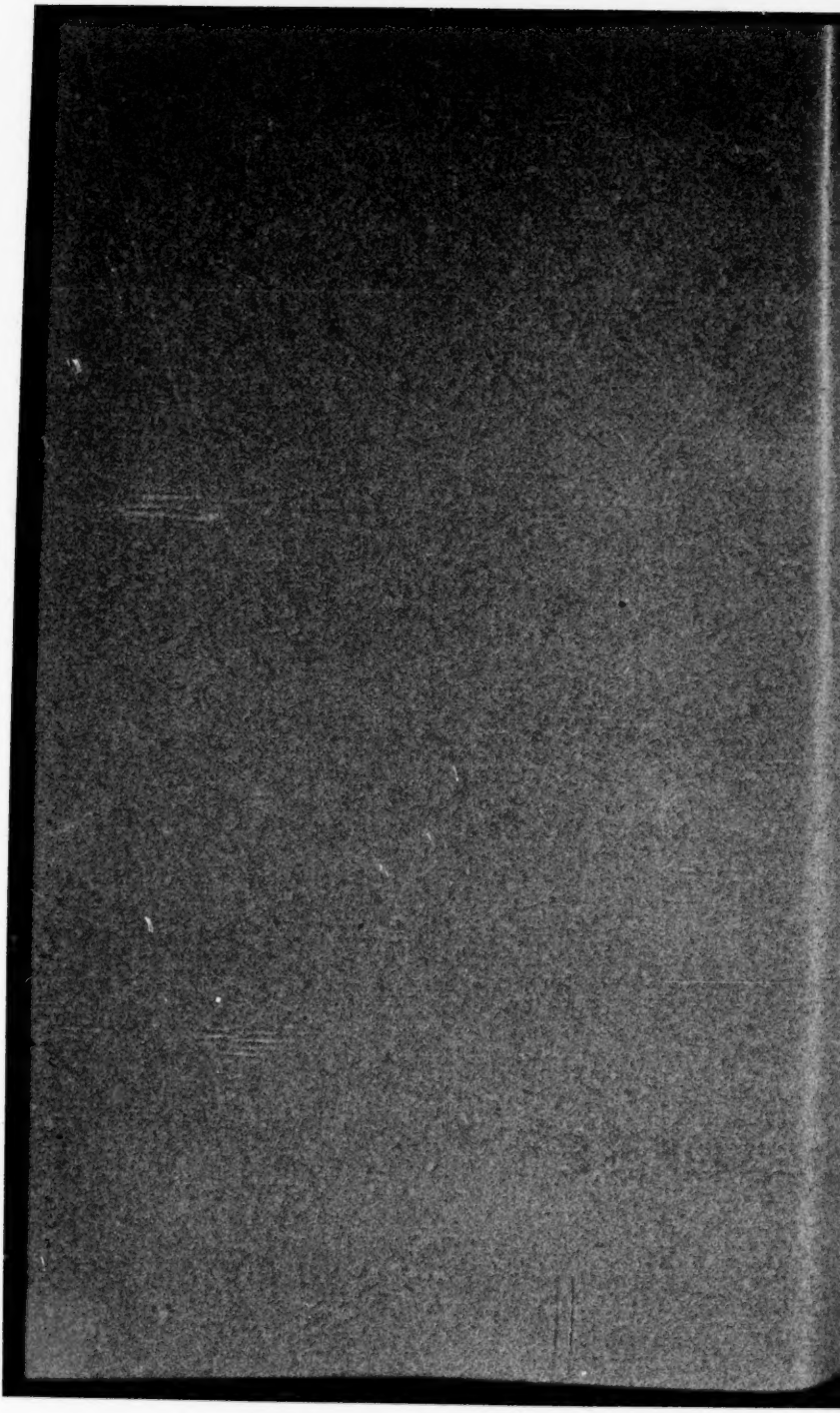

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I.

The first ten Amendments to the Constitution of the United States apply to the National Government alone and are not inhibitions upon the States. In Thorington *vs.* Montgomery, 147 U. S., 691, this court decided that, "The 5th amendment operates exclusively in restriction of Federal power, and has no application to the States." In Davis *vs.* Texas, 139 U. S., 651, this court said,—"The Fifth and Sixth Amendments of the Constitution of the United States * * * are restrictive of the powers of the Federal Government and not restraints upon the States." Again in McElvaine *vs.* Brush, 142 U. S. 155, it was held that, "The first ten articles of amendment were not intended to limit the powers of the States in respect of their own people, but to operate on the Federal Government only." In O'Neil *vs.* Vermont, 144 U. S. 323, it was decided that "as a Federal question, it has always been ruled that the 8th Amendment to the Constitution of the United States does not apply to the States." In Pierson *vs.* Yewdall, 95 U. S. 294, it was decided that Article 7 of the Amendments, relating to trials by jury, applies only to the courts of the United States. This subject received elaborate attention in Ex Parte Spies, 123 U. S. 131, where Mr. Chief Justice Waite, speaking for the court declared, "That the first ten articles of amendment were not intended to limit the powers of the State Governments in respect to their own people, but to operate on the National Government alone, was decided more than half a century ago, and that decision has been steadily adhered to since." In support of this posi-

tion the following cases are cited in the opinion,—Barron *vs.* Baltimore, 32 U. S., 7 Pet 243, Livingston *vs.* Moore, Id. 469; Fox *vs.* Ohio, 46 U. S., 5 How. 410; Smith *vs.* Maryland, 59 U. S., 18 How. 71; Withers *vs.* Buckley, 61 U. S., 20 How. 84; Pervear *vs.* Commonwealth, 72 U. S., 5 Wall. 475; Twitchell *vs.* Commonwealth, 74 U. S., 7 Wall. 321; The Justices *vs.* Murry, 76 U. S., 9 Wall. 274; Edwards *vs.* Elliot, 88 U.S., 21 Wall. 532; Walker *vs.* Sauvinet, 92 U. S. 90; U. S. *vs.* Cruikshank, Id. 542; Pearson *vs.* Yewdall, *supra*; Davidson *vs.* New Orleans, 96 U. S. 97; Kelly *vs.* Pittsburg, 104 U. S. 79; Presser *vs.* Illinois, 116 U. S. 252.

II.

If these Amendments are binding upon the States, the punishment is not cruel and unusual in the case under consideration. The only punishment authorized is fine and imprisonment in the house of correction. For a first offense, the fine may be from five to one hundred dollars, and imprisonment for not more than thirty days, in the discretion of the court; for the second offense, the fine may be from ten to two hundred dollars, and imprisonment for not less than one month and not more than one year. The maximum penalty that could have been imposed in the case for the two offenses proved is a fine of three hundred dollars, and imprisonment for one year and one month. The actual fine imposed was one hundred dollars, and the term of imprisonment sixty days. The penalty of which the plaintiff in error complains is not more severe than that prescribed by the United States in the statute for the prevention of the traffic in intoxicating liquor in the Indian Territory. This has been in force for over half a century, has been repeatedly enforced in the Federal courts, and has thus far escaped the attacks of those who would claim it to be unconstitutional because cruel and excessive punishment is provided. This statute is as follows,—"Sec. 2139, U. S. Statutes, (as amended by an act, approved July 23, 1892, c. 234, 27 Stat. 260.) No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretence, into the Indian country. Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquors of any kind into the Indian country, shall be punished by imprisonment for not more than two years, or by fine of not more than three hundred dollars for each offense." In the license case of Purvear *vs.* Massachusetts, 72 U. S., 5 Wall. 475, which was reviewed in this court, Mr. Chief Justice Chase, delivering the opinion, said,—"But it appears in the record that the fine and punishment in the case before us was $50 and imprisonment at hard labor in the house of correction for three months. We perceive nothing excessive, or cruel, or unusual in this. The object of the law was to protect the community against the manifold evils of intemperance. The mode adopted of prohibiting

under penalties the sale and keeping for sale of intoxicating liquors, without license, is the usual mode adopted in many, perhaps all, of the States. It is wholly within the discretion of State Legislatures. We see nothing in the record, nor has anything been read to us from the statutes of the State which warrants us in saying that the laws of Massachusetts having application to this case are in conflict with the Constitution of the United States." The decision of the Supreme Court of Vermont in the O'Neil case, *supra*, is direct authority for this case. The court said in its opinion in that case—"The constitutional inhibition of cruel and unusual punishments, or excessive fines or bail, has no application. The punishment imposed by statute for the offense for which the respondent, O'Neil, is charged, cannot be said to be excessive or oppressive. If he has subjected himself to a severe penalty, it is simply because he has committed *a great many such offenses*. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offenses in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a *single* offense, the constitutional question might be urged; but here the unreasonableness is only in the number of the offenses which the respondent has committed." State *vs.* O'Neil, 58 Vt. 140. This decision received the sanction of this court when it reviewed the case in question. The language of our court in comparing the case at bar with the O'Neil case, with reference to the dissenting opinion of Mr. Justice Field, is pertinent. "In the O'Neil case the imprisonment proper was one month, but the number of offenses was so large that the fines amounted to a large sum and, if unpaid, the imprisonment would be over fifty-four years for him to work out the fine in the house of correction. It was only the aggregation of imprisonment that Justice Field complained of as cruel and unusual. *Non constat* that *he* would regard the extreme limit of punishment in this case as cruel and unusual. Considering the magnitude of the evil sought to be restrained, the fact that the only motive for committing the offense is cupidity, or desire for pecuniary gain to be acquired by taking advantage of the weakness of fellow citizens, weighed down if not overborne by pernicious habit, we do not think the punishment cruel and unusual. The punishment is graded and made to depend upon whether the conviction is the first or second. It is of such a nature as tends to take away the inducement to the crime. It is not unreasonable in the length of imprisonment nor amount of fine that can be imposed for a single offense." It has been decided by this court that an increase of punishment on conviction of a second offense, by reason of the commission of the first offense, does not make the punishment cruel and unusual. Moore *vs.* Missouri, 159 U. S. 670.

III.

The information is not obnoxious to the Fourteenth Amendment as not being due process of law. The question presented by the assignment of errors is one of procedure and it arises under the following sections of the Revised Laws of Vermont: "Sec. 3859. Complaints for any offense against section 3802 shall be substantially in the following form: State of Vermont county, ss. To A. B., justice of the peace within and for the county of , comes C. D., grand juror of the town of , in said county, and complains that E. F., of on the day of A. D. , at , did at divers times sell, furnish, or give away, (as the case may be,) intoxicating liquor without authority, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State." Sec. 3860. Under the foregoing complaint, every distinct act of selling, furnishing or giving away may be proved and the court shall impose a fine for each offense, or if the number exceeds five and not ten, the respondent shall be adjudged a common seller and be subjected to the penalties provided in section 3810." The section fixing the penalty intended to be enforced by virtue of the foregoing provisions is as follows,—"Sec. 3802. If a person by himself, clerk, servant or agent, sells, furnishes or gives away, or owns, keeps or possesses with intent to sell, furnish or give away intoxicating liquor or cider, in violation of law, he shall forfeit for each offense to the State, upon the first conviction, not less than five nor more than one hundred dollars, and may be imprisoned in the discretion of the court not more than thirty days; upon the second and each subsequent conviction, not less than ten nor more than two hundred dollars for each offense, and shall also be imprisoned not less than one month nor more than one year." The following other sections relate to the Vermont prohibitory law:

"Sec. 3800. No person shall except as otherwise specially provided manufacture, sell, furnish or give away, by himself, clerk, servant or agent, spirituous or intoxicating liquor, or malt liquors or lager beer; and the phrase "intoxicating liquors" where it occurs in this chapter shall be held to include such liquors and beer. The word 'furnish' where it occurs in this chapter shall apply to cases where a person knowingly brings into or transports within the State for another person intoxicating liquor intended to be sold or disposed of contrary to law, or to be divided among or distributed to others. The words 'give away' where they occur in this chapter shall not apply to the giving of intoxicating liquor at private dwellings, or their dependencies, unless given to an habitual drunkard, or unless such dwelling or its dependencies become a place of public resort.

"But no person shall furnish or give away intoxicating liquor at an assemblage of persons gathered to erect a building or frame of a building, or to remove a building or at a public gathering for amusement.

"Nothing in this chapter shall prevent the manufacture, sale and

use of wine for commemoration of the Lord's supper, nor the manufacture, sale and use of cider, or, for medical purposes only, of wine made in the State from grapes or other fruits the growth of the State and which is without the admixture of alcohol or spirituous liquor, nor the manufacture by any one for his own use of fermented liquor.

"But no person shall sell or furnish cider or fermented liquor at or in a victualing house, tavern, grocery, shop, cellar, or other place of public resort, or at any place to an habutual drunkard.

"Sec. 3803. Justices shall have concurrent jurisdiction with the county court in prosecutions under the preceeding section, and the same may be tried upon the complaint of a grand juror of a town, or upon the information of the State's attorney before the county court.

"Sec. 3804. In prosecutions under said section (3802) the prosecuting officer shall allege in the complaint, information, or indictment, known prior convictions under said section to the number of two, and upon trial shall make proof of the same, and in case of a wilful failure so to do shall be liable to the provisions of and the penalty prescribed by section 3852.

"Sec. 3805. In such prosecutions the respondent, if he pleads guilty, shall state in his plea the number of offenses of which he pleads guilty; and the prosecuting officer, under the direction of the court, may accept the plea for such number of offenses, or may put the respondent on trial, in his discretion; and in such prosecutions *no more than one count shall be required*, and no costs shall be allowed to the State's attorney, or taxed against the respondent, for additional counts.

"Sec. 3806. When a person is prosecuted, either by complaint, indictment, or information, for selling, furnishing, or giving away intoxicating liquor, if such person appears before the court wherein such prosecution is pending and pleads guilty to the offenses charged, and judgment is rendered thereon for the penalty, such offenses shall be held to have been committed on the days specifically set forth in such complaint, indictment, or information, unless the respondent, at the time of pleading guilty, specifies some other days on which offenses were committed, in which case an entry thereof shall be made upon such complaint, indictment or information, and become part of the record.

"Sec. 3807. The judgment rendered in such proceedings on plea of guilty shall not be a bar to subsequent prosecutions for other offenses than the ones specified in the complaint, indictment or information, or by the respondent, whether committed on the same day or before or after it. And if on subsequent proceedings against the same person for like selling, furnishing or giving away of intoxicating liquor it appears that such person had been guilty thereof at other times than those specified in the former proceedings, he may be proceeded against therefor as though such other offenses had been committed subsequent to such former judgment.

"Sec. 3847. Cases arising under this chapter shall take precedence of other trials in the court in which they are pending, except

those in criminal cases where the respondents are under arrest; and neither the court nor the prosecuting officer shall enter a *nolle prosequi*, or grant a continuance in a case arising under this chapter, either before or after the verdict, except where in their opinion the purposes of justice require it.

"Sec. 3848. In prosecutions for offenses against the provisions of this chapter where a prior conviction is relied upon to increase the sentence, it shall be set forth in the complaint, information or indictment, and it shall be sufficient in such case to set forth in substance the fact of such prior conviction, the offense for which the conviction was had, and the time and place at which, and the court by and before which it was had.

"Sec. 3850. In trials for offenses against this chapter the respondent may have a trial by jury and upon such trial the jury on conviction shall return a special verdict in cases where it is necessary to enable the court to pass the proper sentence.

"No. 37, Laws of 1886. Section 1. In prosecutions for offenses against any of the provisions of Chapter 169 of the Revised Laws (relating to intoxicating liquors,) where a specification shall be required, it shall be sufficient to specify the offenses with such certainty as to time and person as the prosecutor may be able, and the same shall be subject to amendment at any stage of the trial; and when the specification sets forth the sale, furnishing, or giving away to any person or persons unknown, the witnesses produced may be inquired of as to such transactions with any person, whether named in the specification or not, and as the name of any such person may be disclosed by the evidence it may be inserted in or added to the specification, upon such terms as to postponement of a trial, for this cause as the court shall think reasonable."

Nearly all of the sections of the Revised Laws quoted were enacted in 1852, when Vermont adopted the prohibitory law. Sections 3859 and 3860 were enacted at that time and have not been amended since. In the administration of the law as first enacted some prosecuting officers made use of as many as a hundred counts for selling, as many for furnishing and a like number for giving away, in the same indictment. But the court discountenanced this kind of proceeding, as it enhanced the costs and gave the respondent no additional information of the nature of the accusation except in point of date of commission of the offense. State *vs.* Parker, 26 Vt. 357; (1854) and State *vs.* Freeman, 27 Vt. 523, (1855). Of these cases the Vermont Supreme Court in State *vs.* Brown, 36 Vt. 561, said:

"Those cases were under the original act, in which the same form is given, but which does not contain the provision as to only one count being necessary. In the case of Parker there was but one count, and that was for selling and furnishing, under which it was held that several offenses might be proved; and though the point was not raised, it seems unquestionable that acts of giving away, as well as acts of sale, might have been proved under that count. In State vs. Freeman, the court, by implication at least, discoun-

tenanced the attempt of the State's Attorney to observe technical rules by making counts applicable to the different modes of committing the offense prohibited in Section 9, (3802), instead of using a single count, including 'selling, furnishing and giving away,' using the very language adopted in this complaint, and embracing it in quotation marks, as being the language proper, *in todidem verbis*, to be used, under the statutory provisions."

In 1858 the legislature enacted into law that which had become already the practice of the courts, by adopting the following: "In such prosecutions no more than one count shall be required, and no costs shall be allowed to any State's Attorney, or taxed against any respondent, for any additional counts in such prosecutions."—Sec. 2, Laws of 1858.

It had been held by the courts of Vermont prior to the passage of this act that respondents were entitled to specifications of the offenses relied upon. In State *vs.* Freeman, *supra*, the court said: "It was held by this court in State *vs.* Parker, and we think correctly, that under one complaint the prosecutor might show any number of offenses, being bound, if required, to give the respondent before trial, a specification of the nature of the offenses which he would attempt to prove." In State *vs.* Rowe, 43 Vt. 265, the court said: "It has been ruled in this state that in this class of cases the accused is entitled to a specification of the offenses charged in this form of complaint. It would seem that this ruling was made with the view of satisfying the provision of the 10th article of the bill of rights of our state constitution, which gives the accused, in all prosecutions for criminal offenses, a right to *demand the cause and nature of his accusation*. The respondent had a right to rely upon the specification in the record, as notice of the offenses, in proof of which testimony would be offered, and to claim that the prosecutor should be confined in his proof, to the offenses specified." In State *vs.* Wooley, 59 Vt. 357, a case like this one, the prosecutor specified the names of the witnesses, and further that "there are various other witnesses unknown to the State's attorney at present." Of this case the court said: "It is the general form of charging the offense, prescribed by the statute, which gives the right to a specification. If the form of the indictment required as specific a statement of the offense as is required by the common law rules of criminal pleading no further specification of the offense would be legally required. Hence, the respondent is not legally entitled to a more minute detail of statement of the facts necessary to constitute the offense in the indictment and specification, when taken together, than he would be entitled to in an indictment at common law. In an indictment at common law a good sale, furnishing, or giving away could be charged as made to a person unknown to the grand jurors, and for that reason not named. In legal effect this is the charge, in this respect, by the specifications furnished."

In State *vs.* Brown, *supra* (1864), it was held that this form of complaint was not bad for duplicity. In disposing of this objection,

the court said: "It seems clear that only a single count was necessary in order to charge, and admit proof of, any number of offenses, whether of selling or furnishing, or giving away,—that under such single count offenses by either or all of the three modes of violating the 9th section (3802 R. L.), might be proved. The form given in section 28 (3859 R. L.), implies, and is conformable to this view. If no form had been given, we think the other provisions would have resulted in the same thing. The changing of the word "or" into "and,"—the disjunctive or alternative into the conjunctive—is required not only to answer the requirements of the other provisions, but is in conformity with the general rules of pleading, when it is permitted or required to embrace in the same count the averment of several distinct acts, each constituting a crime of the same character and penalty, and which consisted in the transaction, intended to be, and is in fact covered by one or the other of the alleged acts. But the objection is, not that the word is thus changed—but that the count embraces two separate offenses; and it is insisted that it is not warrantable to join the offense by sale, and that by giving away in the same count. Whatever we might think of this objection, if it stood upon the rules of the common law, we are quite well satisfied that the State's Attorney has acted in strict conformity with the provisions and intent of the statute, in adopting this form of count."

It was decided in Vermont, under the license law that was in force before 1852, that it was unnecessary to aver the name of the person to whom liquor was sold, and that decision is conclusive in Vermont in cases under the prohibitory law as well. In State *vs.* Munger, 15 Vt. 290, the Supreme Court said: "It is said that the indictment is bad, because it is not averred to whom the liquor was sold, or that the person or persons are unknown. It is of no importance that the indictment should contain such an averment. The offence complained of works no injury upon the individual rights of the person to whom the sale was made, and none are supposed to be violated."

The meaning of the words "at divers times," in indictments under Section 3859, was settled in State *vs.* Jones, 39 Vt. 370, (1867), where our court said: "It follows then that the words 'at divers times' means the commission of divers offenses. It would seem that it must mean this, or else letting in proof of a multiplicity of offenses would lead to the trial and conviction of the respondent for offenses for which he had not been indicted. The object, the purpose of these words, is to inform the court that the respondent is indicted for more than one offense, and to so notify the respondent that he may be prepared to meet proof of more than one offense. These words, omitted in this indictment, are the only words in the statute form that indicate to the respondent that more than one offence is charged, or that distinguish it in this respect from a common law indictment for a single offence. It is evident, therefore, that these words for this purpose, are matter of substance, and that without them or something equivalent, only one offence can be proved under a single count."

It was held in State *vs.* Whipple, 57 Vt. 637, that: "The exact

time is not material. It is sufficient if the offenses proved are not barred by the statute of limitations. The statute in relation to offenses of this character, R. L. 3859, regulates the mode of proceeding, and prescribes the form of complaint. And it further provides in S. 3860, that under an indictment, etc., in the form prescribed, every distinct act of selling, furnishing and giving away may be proved. One count only is requisite for any number of offenses. The information in this case is in the form and language prescribed by the statute, and under it the statute, in terms, says every distinct act may be proved. The language of the statute clearly covers all offenses within the statutory period. Each distinct act of selling constitutes an offense, and the time is wholly immaterial, except it must be within the time limited by the statute."

The Statute of Limitations having relation to this kind of offenses is as follows:

"Sec. 1712, R. L. Actions, complaints, informations or indictments for a crime or misdemeanor, other than theft, robbery, burglary, forgery, arson and murder, shall be commenced within three years after the commission of the offence, and not after."

It has been held for a long time by the courts of Vermont that the subject matter of the liquor law comes under section 5 of the Bill of Rights of the Constitution of the State, which is as follows: "That the people of this State by their legal representatives, have the sole, inherent, and exclusive right of governing and regulating the internal police of the same." In State *vs.* Freeman, before referred to, our court, by Chief Judge Isaac F. Redfield, said: "The only question, then would be, whether the provision is constitutional. Of this we entertain no doubt. The only argument upon which it is claimed to be unconstitutional, is, that it conflicts with the tenth article of the Bill of Rights. But the court have now, more than once, held, that the provisions of that article have no reference to trials for minor offenses, affecting the police of the State merely, the 'exclusive control' and regulation of which is by the fifth article of the Bill of Rights, secured exclusively to the legislature of the State, and offenses effecting which, since the first establishment of our government, have been tried before justices of the peace, where there is no indictment, and properly speaking no traverse jury, such as is required by the tenth article, for conviction of crimes, there called 'criminal offenses,' and more commonly high crimes."

Respondents have had no cause to complain that they could not plead a former judgment in bar to a prosecution for a similar offense, for parol evidence is admissible to the extent of protecting them in their rights. In Chase *vs.* School District, 47 Vt. 524, the Vermont court by Poland, J., said: "It has long been settled, that parol proof is admissible to prove or disprove the indentity in litigation with that of the former adjudication." In State *vs.* Brown, 49 Vt. 537, it was held that "When no specification is required nor furnished, the offenses for which the respondent was tried can only be shown by parol; and a prior judgment will be conclusive of * * such offenses as were therein put in issue by the evidence."

The foregoing statutes and the decisions of the highest court of Vermont in relation thereto, constitute essentially the law applicable to the case under discussion. This is the law mainly under which "the trials of these causes have gone on for nearly forty years without special complaint, inconvenience or hardship." It is to be noted that the law complained of as unconstitutional, as first enacted, had been in force for six years before the adoption of the 14th Amendment, and as amended, had been in force for ten years before the adoption of the amendment. The construction that the State now insists applies to the statute in this case, had been established by our supreme court prior to the adoption of the amendment. It is insisted that the procedure authorized had become due process of law before the adoption of amendment, in the State of Vermont. It was, therefore, not affected by the amendment. I. Bishop's New Crim. Pro. Sec. 100, 2, Hurtado *vs.* California, 110 U. S. 516. Missouri *vs.* Lewis, 101 U. S. 22. If affected by the amendment, then it is insisted that the process adopted in the prosecution of these cases in enforcement of the law in the courts of the State for the past forty years has made the process that which is due to those who are charged with the violation of the law.

In this connection it is important to consider what is due process of law. Due process of law is its regular administration through courts of justice by a timely and regular course of proceeding to judgment and execution. As a rule it includes parties, regular pleadings and a trial according to a settled course of proceedings.

Den *vs.* Hoboken, 59 U. S., 18 How. 82; Rees *vs.* City of Watertown, 86 U. S., 19 Wall., 107; Barker *vs.* Kelly, 11 Minn. 480; Dwight *vs.* Williams, 4 McLean, 586; Westervelt *vs.* Grugg, 12 N. Y. 202; Rowen *vs.* State, 30 Wis. 129; Huber *vs.* Riely, 53 Pa. St., 112; State *vs.* Becht, 23 Minn. 412. It does not necessarily require trial by jury. Summary proceedings are included. Walker *vs.* Sauvinet, 92 U. S., 2 Otto, 90; U. S. *vs.* Ferrina, 54 U. S., 13 How. 40; Martin *vs.* Mott, 25 U. S., 12 Wheat, 19.

"Due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." Giozza *vs.* Tiernan, 148 U. S. 659; See also Leeper *vs.* Texas, 139 U. S. 462. "Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient for the purposes of this case, to say that the legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government, with respect to kindred matters, that is by process or proceedings adapted to the nature of the case." Mr. Justice Field in Dent *vs.* State of W. Virginia, 129 U. S. 114. In Hurtado *vs.* California, 110 U. S. 516, this court held, "that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement

is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice." "Due process of law is process due according to the law of the land. This process in States is regulated by the law of the State." Mr. Chief Justice Waite in Walker *vs.* Sauvinet, *supra.*

If it is insisted that the legislature and the courts of Vermont have not the authority to prescribe the procedure in question, and by the adoption of and practice under the same for a long period of time to make it *due process of law*, it is answered that, regardless of the statute authorizing the information, it is in substantial conformity with the canons of good pleading, and describes one offense at least, under 3802 R. L., with all the particularity required by the common law.

(*a.*) Both time and place are formally alleged.

(*b.*) It was proper to allege that the respondent "did sell, furnish, and give away," using all the words in the statute in a single count. This is in compliance with a familiar rule of criminal law which is defined in Bishop on Criminal Procedure 1, Sec. 436, as follows:—"It is common for a statute to declare, that, if a person does this, or this, he shall be punished in a way pointed out. Now, if in a single transaction, he does all the things, he violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore an indictment upon a statute of this kind may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunctive *and* where the statute has "or" and it will not be double, and it will be established at the trial by proof of any one of them. Thus, where the allegation was that the defendant sold spirituous liquors, to wit: rum, brandy, whiskey, and gin in less quantities than one quart, without license, the court overruled the objection that four offenses were thereby charged, saying: 'The selling of any of the liquors named would be an offense, but there is no more reason why an offender should be indicted separately for each, than there would be to charge a thief, who had stolen a suit of clothes, in separate counts for the coat, waistcoat, etc.' The State *vs.* Whitted, 3 Ala., 102. This court has recently decided that an indictment under U. S. Rev. Stat. sec. 5511, is not insufficient as charging three distinct offenses in a single count, which charges that the accused unlawfully carried way, and aided in carrying away, and advised and procured the carrying away, a ballot box and secreted the ballots, the accused not being taken by surprise, or in doubt as to the offense charged. Connors *vs.* U. S., 158 U. S. 408. This case arose upon a motion in arrest. In support of this proposition are also Rawson *vs.* State, 19 Conn. 292; Commonwealth *vs.* Foss, 14 Gray 50; Conley *vs.* The State, 5 W. Va. 522; Teft *vs.* Commonwealth, 8 Leigh, 721; State *vs.* Finan, 10 Iowa 19; State *vs.* Beilby, 21 Wis. 206. It was by statute in Massachusetts made

punishable "if any person shall sell, or offer for sale, or shall advertise, or caused to be advertised for sale" any lottery ticket, etc., and a count was held not to be double which charged that the defendant "did unlawfully offer for sale and did unlawfully sell." Commonwealth *vs.* Eaton, 15 Pick., 273. The language of our court in case at bar is convincing upon this point. "This contention assumes that a sale of intoxicating liquor, under the statute, is a different offense from furnishing it or giving it away. But this is not true. The thing prohibited consists in providing intoxicating liquor contrary to law. It may be done in any one of the three ways specified. A sale, a furnishing, a giving away of intoxicating liquor, each, is the prohibited provision of it aimed to be suppressed by the statute. The quality and magnitude of the offense is the same, in whichever of the three ways it is committed. Every transaction violating this law comes within one of these terms. The prosecutor is confined to a single count. He must frame it to meet the varying phases of his proof. Whether the complaint charges the sale, furnishing, and giving away conjunctively, if a sale is shown, the other words are surplusage, and *vice versa*."

(*c.*) Under our form of statute it is widely held that it is sufficient in describing the liquor to say "intoxicating liquor," and no more. Commonwealth *vs.* Conant, 6 Gray 482; Commonwealth *vs.* Ryan, 6 Gray 137; The State *vs.* Blaisdell, 33 N. H. 388; Plunkett *vs.* The State, 69 Ind. 68; Buell *vs.* The State, 72 Ind. 523.

(*d.*) It is unnecessary to name the person or persons to whom sales are made. Upon this point Mr. Bishop says: "Undoubtedly indentification may be made sufficiently clear to satisfy the demands of legal principles without the name." Bish. Cr. Pro. s. 1047. In support of this proposition are the following authorities: State *vs.* Munger, 15 Vt. 290; State *vs.* Spain, 29 Mo. 415; Hulstead *vs.* Commonwealth, 5 Leigh 724; The State *vs.* Parnell, 16 Ark. 506; People *vs.* Adams, 17 Wend. 475; Canady *vs.* People, 17 Ill. 158; McCuen *vs.* The State, 19 Ark. 630; Green *vs.* People, 21 Ill. 125; The State *vs.* Ladd, 15 Mo. 430; The State *vs.* Muse, Dev & Bat. 319; The State *vs.* Beilby, *supra*; The State *vs.* Gummer, 22 Wis. 441; Commonwealth *vs.* Dove, 2 Va. Cas. 26; Riley *vs.* The State, 43 Miss. 397; Rice *vs.* The People, 38 Ill. 435; The State *vs.* Hickerson, 3 Heisk. 375; The State *vs.* Staley, 3 Lea. 565; The State *vs.* Rogers, 39 Mo. 431; The State *vs.* Kuhn, 24 La. An. 474; The State *vs.* Schweiter, 27 Kan. 499; The State *vs.* Jaques, 68 Mo. 260; State *vs.* Looker, 54 Kan. 227; State *vs* Broughner, (S. D.) 59 N. W. 736.

(*e.*) The statute does not make the offense or punishment vary with the quantity of liquor sold, furnished, or given away, and it therefore need not be alleged. Bishop on Stat. Crimes s. 1039; Plunkett *vs.* The State, 69 Ind. 68; White *vs.* The State, 11 Texas Ap. 476.

(*f.*) The doctrine as to ownership does not apply to cases of this character. It is wholly immaterial who the owner is of the liquor

sold. It is no part of the description of the offense to allege the ownership of such liquor, and the penalty is the same whoever the liquor belonged to. The doctrine of ownership applies only to such offenses as consist wholly or in part in a wrong done to the real or personal property or possession of one who is injured thereby; as for illustration, in cases of malicious mischief, larceny, false pretenses, and in such offenses to or upon the reality as arson and burglary. 1 Bish on Crim. Pro. s. 583, 584.

(*g.*) The general doctrine and practice in cases of this kind do not require an averment of price. Bishop on Stat. Crimes s. 1040; Bishop on Crim. Pro. 1514; Clare *vs.* The State, 5 Iowa 509; The State *vs.* Finan, 10 Iowa 19; The State *vs.* Miller, 24 Mo. 431; The State *vs.* Downer, 21 Wis. 277.

(*h.*) It being unnecessary to allege the price, it is for the same reason unnecessary to state the name of the person who paid the same. The cases cited under the last sub-division of the brief are authority upon this point.

(*i.*) It was unnecessary to allege whether the respondent acted as principal, clerk, servant, or agent. The gist of the offense is the selling, furnishing, or giving away. The respondent would be equally punishable in any case, and it would not aid him in making his defense if the capacity in which he acted when he violated the law was set forth. The words of the statute, "by himself, clerk, servant or agent," are not descriptive of the offense, and their omission, therefore, does not invalidate the form. State *vs.* Finan, *supra*; Commonwealth *vs.* Woods, 165 Mass. 146.

(*j.*) The authority to sell is properly negatived and the information concludes in the usual form.

The words of the statute were followed to such an extent that the court could see on what statute the complaint was drawn; and as many of the substantial words of the statute were set out as were needed to show a *prima facie* violation of the law, and this is all that the canons of good pleading require. Bishop on Crim. Pro. 1614; Comonwealth *vs.* Trickey, 13 Allen, 559; Picket *vs.* The State, 22 Ohio St. 405; People *vs.* Clements, 26 N. Y. 193; Commonwealth *vs.* Smith, 116 Mass. 40; The State *vs.* Walton, 62 Me. 106; Commonwealth *vs.* Castles, 9 Gray, 123; Surratt *vs.* The State, 45 Miss. 601; People *vs.* Nugent, 4 Cal. 341. Mr. Chitty, in 1 Chitty Pl. 213, said: "The observations of Lord Chief Justice DeGray on the structure of an indictment are very forcible and equally applicable to the pleadings in civil actions; the charge must contain such a description of the injury or crime that the defendant may know what injury or crime it is which he is called upon to answer, that the jury may appear to be warranted in their conclusion of guilty or not guilty, upon the premises delivered to them, and that the court may see such a definite injury or crime that they may apply the remedy or the punishment which the law prescribes. The certainty essential to the charge consists of two parts, the *matter* to be charged and the *manner* of charging it. As to the matter to be charged, whatever cir-

cumstances are necessary to constitute the crime imputed, must be set out and all beyond are surplusage. Secondly, as to the *manner* of making the averment. There are cases where a *direct* and positive averment is necessary to be made in *specific* terms; as where the law has affixed and appropriated technical terms to describe a crime, as in murder, burglary and others. It is likewise true that in all cases those *facts* which are *descriptive* of the *crime* must be introduced upon the record by *averments* in opposition to argument and *inference*." The comments of the Chief Judge of Vermont in the case at bar upon the application of the foregoing principles of pleading to this case are apt and forcible. "The offense created by the statute is the provision of intoxicating liquors without authority of law, either by a sale, furnishing or giving away. There are no circumstances necessary to be set out to constitute either of these acts an offense. The terms of the statute as clearly import the prohibited offense as any terms can. The offense is neither heightened nor lessened by, nor dependent upon, the kind or amount of intoxicating liquor sold, nor upon the person to whom the sale, furnishing, or giving away is made, nor upon the amount of money received, nor upon whether made by the respondent or by some one for him. None of these particulars need be set forth to notify the respondent of the offenses with which he is charged, and called upon to answer, not to apprise the jury of what they are to convict or acquit him, nor to apprise the court of the sentence which it should impose. The prescribed form covers the offense in the exact and easily understood language which creates it. This is sufficient. State *vs.* Daley, 41 Vt. 564; State *vs.* Cook, 38 Vt. 437; State *vs.* Jones, 33 Vt. 443; State *vs.* Matthews, 42 Vt. 542; State *vs.* Clark, 44 Vt. 636; State *vs.* Benjamin, 49 Vt. 101; State *vs.* Higgins, 53 Vt. 198; State *vs.* Miller, 60 Vt. 90; State *vs.* Campbell and note, 94 Am. Dec. 251.

"It is also contended that the particulars of the kind of liquor, price, and name of the person to whom sold, should be set forth in the information, both to apprise the defendant of the evidence he has to meet, and to have the record protect him from a second conviction for the same offense. It is never necessary for the state to disclose what is merely its proof of the commission of the offense charged in the information. If the record does not itself identify the offense or offenses for which conviction has been had, on the trial of a subsequent prosecution, such identification may be made by parol testimony. If these particulars were set out in the information, resort might have to be had to parol proof to identify the offense for which conviction was had. It might occur that the same respondent made more than one sale of the same kind and quantity of liquor, to the same person, at the same price, at the same place and on the same day. Besides by the common law it always has been held that the prosecutor need not set forth the name of the person, when unknown. Therefore by the common law the name is not indispensable. The prescribed form answers every essential requirement of the common law in regard to informations or indictments."

While it is true that the information alleges at least one offense with the definiteness required by the common law, the prosecution does not rely wholly upon common law rules to sustain the same, but is aided by a statute prescribing the procedure. If this statute is in violation of any of the rules of the common law, it was at least within the province of the legislature to enact it. Section 689 of the Revised Laws of Vermont provides that: "So much of the common law of England as is applicable to the local situation and circumstances, and is not repugnant to the constitution or laws, shall be the law in this state, and courts are to take notice thereof, and govern themselves accordingly." "By this statute the common law is not in force, in charging a statutory crime created in clear, definite terms, with a prescribed form for charging it in the terms of the statute. It is sufficient in such a case to follow the prescribed form." Chief Judge Ross in the case at bar. Legislatures have repeatedly enacted laws that authorize forms of complaint that lack the fullness of common law forms, and such laws have been widely sustained by the courts. This right has been distinctly recognized by this court in many cases. It was held in Ogden *vs.* Saunders, 12 Wheat. 213, that a state is "in the exercise of its legitimate powers when it is regulating the remedy and the mode of proceeding in its courts." It was held in the same case that: "In prescribing the evidence which shall be received in its courts, and the effect of that evidence, the state is exercising its acknowledged powers." In the matter of Louis Reggell, 114 U. S. 642, this court decided that each state has the right to prescribe the form of pleading and process to be observed in her courts, in both civil and criminal cases, subject only to those provisions of the national constitution designed for the protection of life, liberty and property in all the states of the union. One of the latest authorities upon this point of this court is to be found in Fong Yue Ting *vs.* United States, 149 U. S. 698. The question involved was whether the statute for deportation of the Chinese was constitutional, because it changed the burden of proof and prescribed what evidence should be received. Mr. Justice Gray, in delivering the opinion of the court, said: "The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof by at least one credible white witness, that he was a resident of the United States at the time of the passage of the act, is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government." In Holmes *vs.* Hunt, 122 Mass. 505, the court said: "The forms of procedure and the rules of evidence are within the control of the legislature." Rowen *vs.* The State, 30 Wis. 129, is a leading authority. A statute of Wisconsin provided that "in indictments or informations for murder or manslaughter it shall not be necessary to set forth the manner in which or means by which the death of the deceased was caused, but it shall be sufficient in any indictment or information for murder, to charge that the accused did wilfully, feloniously, and of his malice aforethought, kill and murder the deceased;

and in any indictment or information for manslaughter it shall be sufficient to charge that the accused did feloniously kill and slay the deceased." The following information drawn under this statute was held good: "I, C. K. Martin, district attorney for said county, hereby inform the court that on the 28th day of April, in the year one thousand eight hundred and seventy-one, at said county, James Rowan did wilfully, feloniously, and of his malice aforethought, kill and murder Charles McKenzie, against the peace and dignity of the State of Wisconsin.

"I, C. K. Martin, district attorney for said county, hereby inform the court that on the twenty-eighth day of April, in the year one thousand eight hundred and seventy-one, at said county, the said James Rowan did wilfully and feloniously kill and slay Charles McKenzie, against the peace and dignity of the State of Wisconsin." It was decided that this procedure was not in violation of the constitution of the State, which secures to the accused the right "to demand the nature and cause of the accusation against him." In Leeper *vs.* Texas, 139 U. S. 462, this court had under consideration an indictment reading as follows: "In the name and by the authority of the State of Texas, the grand jurors for the county of Coryell, State aforesaid, duly organized as such at the January Term, A. D. 1890, of the district court for said county, upon their oaths in said court present that Jim Leeper and Ed. Powell, on or about the 17th day of December, A. D. one thousand eight hundred and eighty-nine, in the county of Coryell and State of Texas, did then and there, with malice aforethought, kill and murder J. T. Mathis by then and there shooting him, the said J. T. Mathis, with a pistol, contrary to law and against the peace and dignity of the State." Defendant objected to the form of the indictment as not alleging all the material elements of the crime of murder, and charged that it was in contravention of the constitution of the State of Texas and of the constitution of the United States. To these objections this court said: "We find nothing special, partial or arbitrary or in violation of fundamental principles in the criminal laws of the State of Texas involved, and we perceive no ground for holding that the proceedings complained of, which were had in the ordinary administration of those laws, amounted to a denial by the State of due process of law to these parties, or of some right secured to them by the Constitution of the United States." The case of Bergman *vs.* Backer, 157 U. S. 655, is a stronger case. In this case it was held that a conviction under a statute making an indictment for murder sufficient which charges the defendant with wilfully, feloniously, and of his malice aforethought, killing and murdering a fellow creature, without charging the manner or means by which the crime was committed, violates no right or privilege of the accused. After reciting the statute in controversy, and the decisions thereunder, Mr. Justice Harlan, speaking for the court, said: "In view of these decisions, declaring the meaning and scope of the statutes under which the accused was prosecuted, it cannot be held that he was proceeded against under an indictment based upon statutes denying to him the equal protection of the laws, or that were inconsistent with due processs of law, as prescribed by the 14th

Amendment of the Constitution of the United States." See also Davis *vs.* Utah Ter. 151 U. S. 262.

From a consideration of all the foregoing cases the conclusion is inevitable that it is within strict legislative right to abridge the forms of the common law, even in cases of the highest crime known to the law, where the strictest certainty was formerly insisted upon, to the extent of stripping them of all allegations except such as the law has made affirmative elements of the offense. If then it is within the province of a legislature to form a complaint for murder that lacks the requirements of the common law, it would be absurd to insist that it has not a similar power over those offenses where the punishment is only by fine, or at the most, imprisonment for a brief period. And this "is not an ancient crime which has been, from time immemorial, clothed in special terms, which, by long use, have become the most apt and definite ones to describe the exact crime."

Conceding that the information sufficiently describes one offense under the law, (regarding the words "at divers times" as surplusage), the inquiry is, with the words added, does the information inform the accused of more than one offense. This question is to be determined by a consideration of the question as to whether sections 3859 and 3860, R. L., are a warranted exercise of the legislative powers of the State of Vermont. The test of whether a given form of complaint is sufficient or not is to be found in the answer to the inquiry of whether the defendant is enabled from it to make a preparation for a full and complete defense. This is the rule established by this court recently in the case of Rosen *vs.* United States, 161 U. S. 29, in which Mr. Justice Harlan, for the court, said: "A defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defense and plead the judgment in bar of any further prosecution for the same crime." If he is thus enabled, then he is apprised of the nature and cause of his accusation. The information alleges that on a day named the defendant sold, furnished, and gave away at divers times, intoxicating liquor. It does not charge an "infinite crime." It does not charge a crime which a bill of particulars, giving the minutest details, cannot fully describe. As time is not an element of the offense and need not be proven as alleged, it follows that any offense described may be proven within the period limited by the statute of limitations. Omitting the words, "at divers times," we have a complaint charging in legal effect that the respondent at some time within the period of three years sold, furnished, or gave away, intoxicating liquor. If the complaint in this case is open to the charge that it describes an infinite crime by using the words "at divers times," it is insisted that the complaint with the words omitted is open to the same criticism, if such it can properly be called. For, there being a million or more minutes in the statutory limit, during which a liquor sellor might have plied his trade, and a minute being sufficient time in which to make a sale, it follows that the complaint describes all of the offenses that he has committed during this time, and he must prepare his defense for all these crimes when he is arraigned at

the bar of justice, not knowing what offense the prosecuting officer is going to attempt to prove. This startling result is not peculiar to the liquor law of Vermont. Suppose the defendent had been charged with unlawfully having in his possession with intent to offer for sale, a certain number of lottery tickets, in a certain lottery, for money not authorized by law, where the having in his possession of one ticket is a violation of the law, and he should be put upon trial for the crime. Is it not readily to be seen that he must prepare his defense to meet ten million charges, if so many tickets he had unlawfully in his possession during the statutory limit? Take a more common illustration. Suppose a clerk has been stealing money from his employer in five cent pieces daily during the whole statutory limit for larceny which is six years, and at the end of that time has been detected and charged in the usual form with having taken, stolen, and carried away the sum of one dollar, of the currency of the United States, in the denomination of five cent pieces, of the property of John Smith (his empioyer). Is there any doubt but what he might be convicted of any one of the crimes committed during the six years that the pilfering had been going on, under this complaint? If so, he then must prepare to defend against all the offenses committed, in so far as the complaint is descriptive of the same. It charges a multitude of offenses. And this form of complaint has never been challenged. To return to the complaint at bar, what does this form of allegation require of the defendant by way of defense? Any more than is required where the form omitted the words "at divers times?" Manifestly nothing, for under that form it was seen that he must be prepared to defend against all the offenses committed within the statutory limit. What then is the distinction between the two forms? Simply that under the one the prosecutor may be confined to the proof of one offense, and under the other he may prove all the offenses. The relief in both cases comes in the timely services of a specification.

In the language of the court, "With the words 'at divers times' added, it gives notice that more than one, or many offenses, may be claimed to be shown at the time and place specified. It is not unlike the common count in assumpsit for goods sold and delivered, single, but many offenses may be shown under it. The offenses, whether by a sale, furnishing or giving away, are of the same degree, whether for first or second conviction, require the same or a similar plea, the same or similar verdict, and are similarly punished. The fact that they are included in one count does not invade any constitutional or other right, more than if they were in separate counts."

"In criminal proceedings the joinder of different offenses of the same degree in an indictment does not render the proceeding defective, though it is matter of discretion in the court, on motion to quash an indictment so framed." 1 Chitty Pl. 201; The King *vs.* Kingston, 8 East 41; Young et al. *vs.* The King, 3 D. & E. 98. "The prescribed form sets forth in clear language, easily to be understood, 'the cause and nature of the accusation.' It meets fully the tenth article of the Bill of Rights in this respect. By the use of the words 'at divers times,' on the day named, it notifies him that he may be called upon to

meet more than one offense committed in one of the ways named. The prosecution is never confined to prove the offense on the day specified in the information, if the proof is within the time limited for the prosecution of the offense."

The information authorized has some comparison in a declaration for trespass upon the freehold, where under a single count one act committed prior to the date alleged and any number of acts between this date and the date of the writ can be proven.

All difficulties of defense because of the general scope of the charge are removed by specifications informing the defendant of what witnesses he is to be prepared to meet, and of what offenses he is to be prepared to defend against. In case of the charge of a single offense, this can be done by stating the date and particulars of a single transaction. In respect to the charge of more than one offense this can be done equally well by stating the date and particulars of the several transactions constituting the alleged infractions of the law. It can readily be seen that the only difference in the practical operation of the law toward respondents is that where but one offense is alleged and specifications are furnished, he has to defend but one act, but where more than one crime is charged, he has to defend as many as are charged. While this method may entail more labor upon his counsel it deprives him of no substantial rights. It is indeed an advantage, for it enables him to settle his account with the State in a single accounting, whereas if this were not the case he would be followed by a multitude of suits with the attendant costs. It has been uniformly held in Vermont, as is seen by reference to decisions quoted in the early part of the brief, that respondents are entitled to and have been furnished specifications in this class of cases from the earliest enforcement of the law. In 1886 the legislature recognized this right which the courts had accorded to respondents by enacting the act in relation thereto quoted at length heretofore. The respondent was furnished a specification of this kind which is set forth at length in the record. This informed the accused of the names of the witnesses, and should be construed according to the practice in Vermont, with the information. If it is insisted that this is permitting a bill of particulars to take the place of a substantial averment in the information, it is to be answered that it is by legislative sanction under circumstances which do not deprive the defendant of the information guaranteed by the constitution. People *vs.* Hanaw, (Michigan 1895,) N. W. Rep. 231, is strikingly in point. Defendant was charged with embezzlement, and the evidence indicated that the complainant gave to him for collection for his use and benefit, a check held by complainant upon a firm in New York. The defendant sent the check to New York, and received a draft payable to his order, and deposited this draft with a banker, receiving credit therefor. The complaint charged him with the embezzlement as "clerk, agent, servant, and collector," and with an embezzlement of a specified sum of money of the goods and chattels of complainant, and that said goods and chattels came to the possesion of defendant by virtue of his employment, etc. A bill of particulars was filed, stating the facts hereinbefore set forth with regard to the draft. The complaint was amended by inserting the words, for the

use and belonging to the said James A. Follett, (the complainant). The statute under which this proceeding was instituted, (Sec. 9176 a. 3 How. Ann. St.) is as follows: "If any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent or servant of any private person, or of any co-partnership, except apprentices, and other persons under age of sixteen years, or if any attorney at law, collector or other person, who, in any manner, receives or collects money, or any other property for the use of and belonging to another, embezzles or fraudulently converts to his own use, or takes and secretes with intent to embezzle and convert to his own use without the consent of his employer, master or the owner of the money or goods collected or received, any money or property of another, or which is partly the property of such other and partly the property of such officer, agent, clerk, servant, attorney at law, collector or other person, which has come to his possession or under his care in any manner whatsoever, he shall be deemed to have committed larceny, and, in the prosecution for such crime, it shall be no defense that such officer, agent, servant, attorney at law, or other person, was entitled to a commission out of such money or property, as commission for collecting or receiving the same for and on behalf of the owner thereof, provided that it shall be no embezzlement on the part of such agent, clerk, servant, attorney at law, collector, or other person, to retain his reasonable collection fee on the collection, or any other valid interest he may have in such money or property."

Section 9421 of the same statutes provides, that: "In any prosecution for the offense for embezzling the money, bank notes, checks, bills of exchange, or other securities for money, of any person, by a clerk, agent or servant of such person, it shall be sufficient to allege generally in the indictment an embezzlement of money, to a certain amount, without specifying any particulars of such embezzlement, and on the trial, evidence may be given of any such embezzlement committed within six months next after the time stated in the indictment, and it shall be sufficient to maintain the charge in the indictment, and shall not be deemed a variance, if it shall be proved that any money, bank note, check, draft, bill of exchange, or other security for money, of such person, of whatever amount, was fraudulently embezzled by such clerk, agent or servant, within the said period of six months." It was insisted that the last mentioned statute was unconstitutional for the reason that the defendant was not apprised of the charge against him. But the supreme court ruled otherwise, and in the opinion said: "We think that it is within the power of the legislature to prescribe the form of indictments, keeping in view the constitutional right asserted in the case; and where, as in embezzlement, the defendant has a right to have the charge made certain by examination or bill of particulars, it cannot be said that he is not informed of the nature of the charge. If this is permitting a bill of particulars to take the place of substantial averment in the indictment, it is by legislative sanction, under circumstances which do not deprive the defendant of the information guaranteed by the constitution."

The comments of Judge Ross, in delivering the opinion of the court

in this case upon this point, are instructive. "The accused can of right call upon the prosecutor to specify more fully what is claimed to be included under these general terms. This is analogous to the common counts in assumpsit in civil cases which grew up under the common law. The defendant in a civil case is entitled to a notice of what he is called upon to meet, as much as respondents in a criminal case, and for the same reasons. Under these common counts it has always been held that the plaintiff might show any number of claims of the class described, and for this reason, that the defendant was entitled, as a matter of right, to a bill of particulars, or specifications, and that such specifications supplied what was lacking by the generality of the count, in regard to the particulars and number of similar claims which the plaintiff would call upon the defendant to litigate. In this view the information, aided by specifications, is good by the rules of the common law." * * * "The respondent contends that the prescribed form is defective in that it does not require the names of the persons to whom sales are claimed to have been made to be set forth; that sales must be made to some person. But this contention is based on the requirements of the common law, when applicable. The specifications ordinarily would, and did in this case supply this information.

But it is insisted that the act of 1886, relating to specifications, is unconstitutional, in that it fixes the question of the sufficiency of specifications, thereby depriving the courts of the exercise of that discretion to which respondents are entitled. If it is true that this act is unconstitutional it was the privilege of the court to have disregarded it. The court was not bound in its discretion to say that the prosecuting officer had alleged the offenses in the specification with all the certainty as to time and person that he was able, because he so alleged in the specifications. It was within the province of the court to have directed a more minute statement as to the crimes intended to be proved, and it was not in the nature of things impossible to have furnished it. The statement was such as satisfied the respondent, for he took no exception to it.

The language of this court in Rosen *vs.* United States, *supra*, is suggestive. "And if he wished to be informed, before entering upon trial, what particular parts of the paper would be relied upon as bringing the case within the statute, he could, as already suggested, have applied for a bill of particulars, which the court, in the exercise of sound legal discretion, might have granted or refused as the ends of justice required."

It was too late to raise the question of the sufficiency of the specifications in a motion in arrest of judgement. This being so, this court has no jurisdiction of this question. To give this court jurisdiction to review a State judgment the title, right, privilege or immunity relied on must be specially set up or claimed at the proper time and in the proper way, and the decision must be against it. Duncan *vs.* Missouri, 152 U. S. 377.

If the count is bad for duplicity, it is cured by verdict. "If the defendant did not object before, it has been demonstrated that the duplicity did him no harm; and by being silent when, if ever, he must

have felt the hurt, he has waived all right to complain." Bishop's Crim. Pro. s. 443, 3. This point cannot be raised by motion in arrest. Connors *vs.* United States, 158 U. S. 408.

The respondent's counsel further insists that the legislature by enacting that this class of cases shall stand for trial at the first term, that a continuance shall not be allowed without cause shown, that a *nolle prosequi* shall not be entered without cause, and only with the consent of the court, has invaded the province of the court so that the defendant does not have a common law jury trial, and for that reason the whole law is unconstitutional. This brings us to the consideration of the question as to whether the defendant was accorded the "equal protection of the laws." "This class of cases is not exceptional in their manner of trial. They are proceeded with like all other cases. The selection and empaneling of the jury, the rules of evidence, burden of proof, and procedure in the trial, is the same as in all other criminal cases. * * * He was notified, in clear and unmistakable language, of the offense with which he was charged; he heard the evidence by which it was sought to be established; he was given ample opportunity to meet it by counter evidence; and was given an impartial jury to determine whether the charges were established beyond a reasonable doubt." Chief Judge Ross in the case at bar.

If the statute in question affects all persons in Vermont engaged in the traffic in liquors in the same manner, it is not open to the objection that it denies to any one the equal protection of the laws. Giozza *vs.* Tiernan, 148 U. S. 659, is decisive of this point. Here this court said: "This statute effects all persons in Texas engaged in the sale of liquors in exactly the same manner and degree. Whether considered as imposing restrictions upon the sale in the exercise of the police power of the State, or as levying taxes upon occupations under the authority of the legislature in that behalf, petitioner was not arbitrarily deprived of his property nor denied the equal protection of the law. Repeated decisions of this court have determined that such legislation is not in violation of the constitution." Crowley *vs.* Christensen, 137 U. S. 86; Eilenbecker *vs.* Plymouth County, 134 U. S. 31; Kidd *vs.* Pearson, 128 U. S. 1; Mugler *vs.* Kansas, 123 U. S. 623; Foster *vs.* Kansas, 112 U. S. 201; Bells Gap R. Co. *vs.* Penn. 134 U. S. 232; Home Ins. Co. *vs.* New York, 134 U. S. 594; Pacific Exp. Co. *vs.* Leibert, 142 U. S. 339; Walston *vs.* Nevin, 128 U. S. 678; Wurts *vs.* Hoagland, 114 U. S. 606; In re Converse, 137 U. S. 624; Barbier *vs.* Connelly, 113 U. S. 27; Hing *vs.* Crowley, 113 U. S. 703.

The laws in question in this controversy do not abridge the privileges and immunities of the accused as a citizen of the United States. None of the fundamental rights belonging to him as a citizen of the United States have been denied him. It is sufficient that he has been accorded all the rights which are secured in Vermont to all who are similarly situated. It has happened that in the administration of the liquor law certain procedure has been provided, differing in some respects from procedure in other classes of crimes. It is sufficient for the purposes of this case that our constitution and laws authorize this system of administration of this law. It is for the State to determine

what shall be the privileges and immunities to be enjoyed by citizens of the United States under its constitution and laws, as well as to prescribe what shall be due process of law in cases like this. The United States Constitution does not make the privileges and immunities enjoyed by the citizens of one State under the constitution and laws of that State, the measure of the privileges and immunities to be enjoyed as of right, by a citizen of another State under its constitution and laws. McKane *vs.* Durston, 153 U. S. 685. "The 14th Amendment," as was said by Mr. Justice Bradley in Missouri *vs.* Lewis, 101 U. S. 22, "does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding."

The statutes in question are a part of the police regulations of Vermont, and as such, are not affected by the 14th Amendment to the Constitution of the United States. These powers were reserved to the States at the time of the adoption of the National Constitution, and this amendment was not designed to interfere with the province of the State in the exercise of them. In Giozza *vs* Tiernan, 148 U. S. 659, this court, by Mr. Chief Justice Fuller, said: "The amendment does not take from the States those powers of police that were reserved at the time the original constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the State to protect the lives, liberty, and property of its citizens, and to promote their health, morals, education and good order." This court in Leeper *vs.* Texas, 139 U. S. 462, said: "That by the Fourteenth Amendment the powers of States in dealing with crimes within their borders are not limited, except that no State can deprive particular persons, or classes of persons, of equal and impartial justice under the law." In Ex parte Converse, 137 U. S. 624, Mr. Chief Justice Fuller, speaking for the court, said: "We repeat, as has been so often said before, that the 14th Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses, but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of the State." In Re Kemmler, 136 U. S. 436, it was held, that "the 14th Amendment did not radically change the whole theory of the relation of the States and the Federal government to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a State. Protection to life, liberty and property rests, primarily, with the States, and the amendment furnishes an additional guaranty against any encroachment by the States

upon those fundamental rights which belong to citizenship and which the State governments were created to secure. The privileges and immunities of the citizens of the United States, as distinguished from the privileges and immunities of the citizens of the States, are indeed protected by it; but these are privileges and immunities arising out of the nature and essential character of the national government, and granted and secured by the Constitution of the United States." * * * "Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses. But it was not designed to interfere with the power of the State to protect the lives, liberties, and property of its citizens, and to promote their health, peace, morals, education and good order." In Barbier *vs.* Connelly, 113 U. S. 27, this court said: "The 14th Amendment in declaring that 'no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection should be given to all under like circumstances in the enjoyment of their personal and civil rights, that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts, that no impediment should be imposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and conditions, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity." See U. S. *vs.* Cruikshank, 92 U. S. 542; Slaughter House Cases, 83 U. S., 16 Wall. 36; Arrowsmith *vs.* Harmoning, 118 U. S. 194; Baldwin *vs.* Kansas, 127 U. S. 52.

That the regulation of the liquor traffic is a proper matter of State control has been repeatedly decided by this court. In Crowley *vs.* Christensen, 137 U. S. 86, Mr. Justice Field said: "By the general concurrence of the opinion of every civilized christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attribu-

table to the use of ardent spirits obtained at these retail saloons than to any other source. * * * * It is a question of public expediency and public morality, and not of Federal law. The police power of the State is fully competent to regulate the business, to mitigate its evils or to suppress it entirely." Mr. Justice Brown said, in rendering the opinion in Louisville & N. R. Co. *vs.* Commonwealth of Kentucky, 161 U. S. 677, that: "Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State, and within legislative control, and in the exercise of such power the legislature is vested with a large discretion, which if exercised *bona fide* for the protection of the public is beyond the reach of judicial inquiry."

But it is insisted that the law complained subjects the offender to very great hardship, makes the crime of which he is charged, by reason of the imprisonment that may follow a conviction, infamous, permits the courts of an inferior jurisdiction even to strip him of his property and imprison him for a long period of time. But this makes the regulations none the less police regulations under the general scope and meaning of the term. "They are but the ordinary police regulations such as the State may make in respect to all classes of trade and employment." Cooley's Const. Limitations, s. 726; Bode *vs.* State, 7 Gill. 326; Bancroft *vs.* Dumas, 21 Vt. 456; Thomason *vs.* State, 15 Ind. 449; License Cases, 5 How. 504; Metropolitan Board of Excise *vs.* Barrie, 34 N. Y. 657; Goddard *vs.* Jacksonville, 15 Ill. 59; Kattlering *vs.* Jacksonville, 50 Ill. 39; State *vs.* Allmond, 2 Houst, 612. If the "way of the offender is hard" under this law, this does not make it unconstitutional, or the less a police regulation. Says, Mr. Justice Field in Missouri Pac. R. Co. *vs.* Humes, 115 U. S. 512, "It is hardly necessary to say that the hardship, in policy, or injustice of State laws, is not necessarily an objection to their validity; the remedy for evils of that character is to be sought from State legislatures." That the process is somewhat summary and the method unusual does not render the law the less a police regulation. If all the hardship of which counsel for respondent complain had been visited upon his head, instead of the limited sentence imposed, this would have been little worse in the general result than what is obtained before police justices in our large cities, where by the consideration of such courts certain unrepenting transgressors are kept for the greater portion of their lives at hard labor upon sentences imposed without the intervention of a jury to determine the facts of the cases. And yet this practice is proper as a police regulation. Says Mr. Justice Brown, in this connection in Lawton *vs.* Steel, 152 U. S. 142: "There is not a State in the union which has not a constitutional provision entitling persons charged with crime to a trial by jury, and yet from time immemorial the practice has been to try persons charged with petty offenses before a police magistrate, who not only passes upon the question of guilt, but metes out the proper punishment. This has never been treated as an infraction of the constitution, though technically in this way a person may be deprived of his liberty without the intervention of a jury."

This court has no authority to declare the statutes in question void

on account of their collision with the State constitution, and the construction of the State statutes by State courts is conclusive and binding upon this court. It was held in Leeper *vs.* Texas, 139 U. S. 462, "That whether statutes of a legislature of a State have been duly enacted in accordance with the requirements of the constitution of such State is not a Federal question, and the decision of State courts as to what are the laws of the State is binding upon the courts of the United States." South Ottawa *vs.* Perkins, 94 U. S. 260; Post *vs.* Kendall Co. Suprs. 105 U. S. 667; Norton *vs.* Shelby County, 118 U. S. 425; Atlantic & G. R. Co. *vs.* Georgia, 98 U. S. 359; Baldwin *vs.* Kansas, 129 U. S. 52. It was held by Mr. Chief Justice Fuller in Ex parte Converse, 137 U. S. 624: "It is not our province to inquire whether the conclusion reached and announced by the Supreme Court (of Michigan) was or was not correct, for we are not passing upon its judgment as a court of error, nor can we consider the contention that the decision was not in harmony with the State Constitution and laws." It was further held in this case that "the State cannot be deemed guilty of violating its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction." Mr. Chief Justice Waite, in Walker *vs.* Sauvinet, 92 U. S. 90, declared, "Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land; that is to say, with the Constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States. Here the State court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States." In the case of Leffingwell *vs.* Warren, 67 U. S., 2 Black 509, it was decided that: "The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text." The meaning of a State statute, declared by the highest court of the State, is conclusive upon this court. Randall *vs.* Brigham, 74 U. S., 7 Wall. 523. "The law in question was held to be within the legislative power, and so far as the State Constitution is concerned, that conclusion is not re-examinable here." Giozza *vs.* Tiernan, 148 U. S. 659. The Supreme Court has no authority, on a writ of error from a State court to declare a State law void on account of its collision with a State Constitution. Jackson *vs.* Lamphire, 3 Pet. 280. The ruling of a State court that a State law does not violate the State Constitution, is conclusive upon this court. Gut *vs* Minn., 76 U. S. 35. If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications. Leffingwell *vs.* Warren, *supra*. United States *vs.* Morrison, 4 Pet. 124; Green *vs.* Neal, 6 Pet. 291.

IV.

If the State court did consider and decide any Federal question wrongly as against the respondent, it also put the case upon a ground involving no Federal question, broad enough to sustain the decision reached; and therefore the United States Supreme Court has no jurisdiction. The defendant's objections rest upon the motion to quash, and a motion in arrest of judgment. The former motion was made in the trial court, and it stated that the state's attorney "had no legal authority to make and file such information in said cause." This was overruled, and defendant excepted. The opinion in the case sufficiently disposes of the objection. "The motion to quash was properly denied. Whether strictly addressed to the discretion of the trial court and not revisible in this court, or otherwise, the ground of the motion was that the State's Attorney had not authority to proceed by the information. That ground is not insisted upon now. While held to be addressed to the discretion of the trial, and not revisible in this court, because it cannot be pleaded as a matter of right, in State *vs.* Stewart, 59 Vt. 273; in State *vs.* Keyes, 8 Vt. 57; State *vs.* Davis, 52 Vt. 376; and State *vs.* Meader, 62 Vt. 458, in which, whether the entertainment of such motions is discretionary with the trial court, was not raised or considered, the denial of such motions by the trial court was considered and passed upon in this court. In the case last named, the judgment of the trial court, on such a motion, was reversed and the complaint was adjudged insufficient and quashed. But if the question presented by such motion can be entertained in this court, it can be entertained only upon the ground raised by the motion, and passed upon by the trial court. Error in the action of the trial court must distinctly appear. The party cannot be allowed to urge one ground for sustaining the motion in that court and then, in this court, set up a new ground for sustaining it, a ground not considered nor passed upon by the trial court. The respondent's counsel contends that by using in the motion the words, "such information," he thereby raised the question of the sufficiency of the information. But this is not the ordinary and natural construction to be placed upon the language of the motion. If he really intended to raise the question of the insufficiency of the information, we should have expected he would have pointed out wherein he claimed it was insufficient. He should have done so to have raised that question. It is not for the trial court to hunt for some concealed rather than clearly defined ground for entertaining the motion. For this court to revise the action of the trial court on such motion, as we think it might, if it was shown that the trial court entertained it, and passed upon its sufficiency as a matter of law, the grounds for the motion, as well as the action of the trial court, should be clearly and fully set forth. Otherwise this court will assume that the trial court denied the motion as a matter of discretion."

When the case came to the Supreme Court upon the exception to the refusal of the court to grant the motion to quash, the defendant filed in the Supreme Court his motion in arrest of judgment. This was out of order in that court, sections 1699 and 1700 of the Revised Laws pro-

viding that such motions be made in the county court and passed to the Supreme court, and the court heard the motion not as a matter of right but as a matter of favor.

Such motions are limited in their operation. After verdict every reasonable intendment is made in support of the verdict, if there is nothing on the record to prevent it. Chitty lays down the rule thus: "The general principle upon which it depends appears to be that where there is any defect, imperfection or omission, in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required, on the trial, proof of facts so defectly or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict. The court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleading was proved at the trial, and such an intendment must arise, not merely from the verdict, but from the united effect of the verdict and the issue upon which such verdict was given." This view of the principle has been frequently affirmed by the Supreme Court of Vermont. In Needham *vs.* McAuley, 13 Vt. 65, the court by Collamer, J., said: "The law is that after verdict, everything will be intended or be presumed to have been proved which is implied or must have appeared in proving what is actually alleged." In State *vs.* Freeman, 63 Vt. 496, it was held that a complaint charging that the accused "did profanely curse," was sufficient after motion in arrest. See also Morey *vs.* Homan, 10 Vt. 564; Manwell *vs.* Manwell, 14 Vt. 14; Closson *vs.* Staples, 42 Vt. 207; Noyes, French & Fickett *vs.* Parker, 64 Vt. 379, where this principle is further discussed and recognized. Apply the rule of the common law set forth above, which is likewise the law of Vermont, to the case at bar, and it removes all the essential objections of the defendant to the form of the indictment. This strips the question of all Federal issues and bases the judgment upon a ground broad enough to sustain the decision without involving any Federal question. This court then has no jurisdiction. It is a well established and well understood rule of this court that where the Supreme Court of the State decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon on independent ground, not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question. State of Conn. *vs.* Woodruff, 153 U. S. 689; Hammond *vs.* Johnston, 142 U. S. 73; Hopkins *vs.* McLure, 133 U. S. 380; Hall *vs.* Akers, 132 U. S. 554; Henderson Bridge Co. *vs.* The City of Henkerson, 141 U. S. 679; New Orleans *vs.* New Orleans Water Works Co., 142 U. S. 79; Murdock *vs.* City of Memphis, 20 Wall. 591; Missouri P. R. Co. *vs.* Fitzgerald, 160 U. S. 556; Chemical Natl. Bank *vs.* City Bank, 160 U. S. 646; Dibble *vs.* Bellingham, U. S. S. C., 16 S. C. Rep. 936. "He did not take the point, either before the justice of the peace or the county court, that there was any defect or

want of fullness in the complaint. Any such point was waived by a failure to take it. *Besides it did not involve any Federal question.* The question of the consolidation of several offenses in one complaint is purely a matter of State practice, and it is a familiar rule of criminal law that time need not be proved as alleged." Mr. Justice Blatchford in O'Neil *vs.* Vermont, 144 U. S. 323, and cases therein cited. It has been also held by this court, "That to give this court jurisdiction to revise the judgment of a State court under section 709 of the Revised Statutes, because of the denial of the State court of any right, title, privilege or immunity claimed under the constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was specially set up or claimed at the *proper time* and in the *proper way*." Leeper *vs.* Texas, 139 U. S. 462; Spies *vs.* Ill. 123 U. S. 131; Baldwin *vs.* Kansas, 129 U. S. 52; Chappell *vs.* Bradshaw, 128 U. S. 132.

"It is an axiom in American jurisprudence that a statute is not to be pronounced void upon this ground (a constitutional one) unless the repugnancy to the constitution be clear, and the conclusion that it exists, inevitable. Every doubt is to be resolved in support of the enactment." Pine Grove Township *vs.* Talcott, 86 U. S. 666.

It is well to bear in mind that: "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry, whether the legislature has transcended the limits of its authority." Mr. Justice Harlan in Mugler *vs.* Kansas, *supra.*

The warning of Sir Mathew Hale, expressed in 2 P. C. 193, applies as well to misdemeanors as to the highest crimes: "In favor of life, too great strictness has been in all times required in point of indictments: and the truth is, that it has grown to a blemish and inconvenience in the law and the administration thereof. More offenders escape by the over easy ear given to exceptions in indictments than by their own innocence; and many times gross murders, burglaries, robberies, and other heinous and crying offenses, escape by these unseemly niceties to the reproach of the law, to the shame of the government, and to the encouragement of villainy, and to the dishonor of God; and it were very fit, that by some laws, this overgrown curiosity were reformed, which is now become the disease of the law, and will, I fear, in time grow mortal, without some timely remedy."

Frank L. Fish

C. A. Prouty.